

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 10TH NOVEMBER 2006 / 19TH KARTHIKA 1928

CRL.A.No. 1155 of 2005()

SC.214/2002 of ADDITIONAL DISTRICT & SESSIONS COURT (ADHOC)-II,
KOLLAM
.....

APPELLANT(S): ACCUSED:

JOHNSON @ JOY, S/O. ALEXANDER,
PLAVILA VEEDU, ONAMBALAM, PERAYAM CHERRI,
MULAVANA VILLAGE.

BY ADV. SRI.ALEXANDER SKARIA
SRI.GRASHIOUS KURIAKOSE

RESPONDENT(S): COMPLAINANT:

STATE - S.I. OF PLICE, EAST KALLADA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

PUBLIC PROSECUTOR SRI.C.M.NAZAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 10/11/2006, ALONG WITH CRA NO. 1156 OF 2005 THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

K. HEMA, J.

CRL. A. NO. 1155 & 1156 OF 2005

Dated this the 10th day of November, 2006.

J U D G M E N T

The appellant was charge-sheeted for offences under Section 55 (a) and 55(i) of Abkari Act (Act, for short). He was convicted and sentenced under Section 55 (a) of the Abkari Act for possession of arrack, to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1 lakh and in default of payment of fine he was also directed to undergo rigorous imprisonment for one year. The said conviction and sentence are challenged in this appeal.

2. According to the prosecution, on 06.10.1999, PW4 the Assistant Sub Inspector of Police was on patrol duty along with PW3 the Police Constable and others at about 9.45a.m. They found the accused carrying a can on the left hand and a glass on the right hand and standing in the property of one Antony. On seeing the police party, accused attempted to run away, but he was apprehended and on examination of the can it was found to contain arrack. The can was found closed and it contained two litres of arrack. The glass was found to have smell of arrack and also drop of arrack. 150ml of sample was drawn from the can and it was sealed.

3. The accused was arrested. The contraband articles M.O.1

and M.O.2, the can and the glass, were seized . The sample was also seized under a mahazar Ext. P1 in the presence of two independent witnesses. A crime was registered at the police station by PW4, the Assistant Sub Inspector of Police and the First Information Report is Ext. P3. Part of the investigation was conducted by PW4 and the articles were produced before PW5, the Sub Inspector of Police. He prepared the property list, Ext. P4. The sample was caused to be analysed as per Ext. P5, the chemical analysis report, and a charge was laid against the appellant under Section 55(a) and 55(i) of the Act.

4. To prove the prosecution case, prosecution examined PWs 1 to 5, marked Exhibits P1 to P5. M.O.1 and M.O.2 were also marked. Accused did not adduce any evidence, but pleaded innocence of the allegations made. He submitted that he was taken from his house and he has absolutely nothing to do with the articles seized in this case. He has no connection with the contraband articles produced in this case and it was not taken from his possession.

5. The trial court believed the evidence of PWs 3 and 4, who are the Police Constable and the Assistant Sub Inspector of Police, who were in the police party. They were examined to prove the search, seizure and arrest of the accused. The court below found, on the basis

of the decision of the Supreme Court, that it is not proper judicial approach to distrust and suspect police officials without good grounds. No grounds were highlighted by the defence to disbelieve PWs 3 and 4, it was held. The court below found that it is the quality of evidence and not quantity, which is the deciding factor. The presence of the accused with the contraband articles on the northern side of the house of Antony followed by the arrest, seizure of contraband article, preservation of the same etc. were found to be true on the basis of the evidence adduced by PWs 3 and 4.

6. The accused was, therefore, found guilty of offence under Section 55(a), since he was found in possession of two litres of arrack. The court found that there is no evidence to prove the sale of the contraband article and hence no conviction was entered for offence under Section 55(i) of the Act. To prove the occurrence, PWs 1 to 4 were examined. PW1 and 2 are the relatives of the accused and they turned hostile to the prosecution. They did not incriminate the accused and according to them the accused was not present at the scene. Their evidences, therefore, does not prove the arrest, search and seizure. The evidence of PWs 3 and 4, therefore, deserves detailed consideration.

7. It is true that it is not proper judicial approach to suspect or distrust a police official. At the same time, the court cannot proceed on the assumption that they are not believable. In an offence under the Act where stringent punishment is provided by the Act, the court has to be careful in analyzing the evidence of the official witnesses and entering a conviction against the accused. This is specially so when independent evidence is lacking to prove the arrest, search and seizure of the contraband article from the accused.

8. PWs 3 and 4 gave evidence more or less corroborating each other in almost all material particulars. PW3 stated that the accused was found carrying a can and a glass from the "back side" of the house of Antony. PW4 stated that the accused was found in the property of Antony carrying a can and a glass. PW2 deposed that the accused was standing on the "northern" side of the house of Antony. As per the mahazar, the accused was found on the "western" side of the property. Both of them deposed that the accused attempted to run away and he had apprehended and the articles M.O.1 and M.O.2 were seized from his possession and that M.O.1 contain two litres of arrack. Both of them stated that the accused was arrested from the spot and the mahazar was prepared.

9. The question is whether the parrot like version of PWs 3 and 4, the police officials is to be believed to enter a finding that the accused was found in possession of arrack or not. The definite case of the accused is that he was not found in possession of arrack and he was taken to the police station and a case is falsely charge-sheeted against him. The detecting officer, PW4, is the Assistant Sub Inspector of Police. As per the Act, search under Section 31 and 34 and seizure of the contraband article can be made only by an "Abkari Officer" or a police officer not below the rank of the Sub Inspector. But, admittedly, PW4 is an officer below the rank of Sub Inspector, being an Assistant Sub Inspector. He is not an Additional Sub Inspector.

10. As per the definition of Abkari officer, a Commissioner of Excise or any officer or any other person lawfully appointed or invested with powers under Sections 4 or 5 of the Act, can be said to be an Abkari officer. Section 4 of the Act reads as follows.

“[The Government] may appoint an officer to control the administration of the Abkari Department - [The Government may, by notification in the Gazette:-]

(a) appoint an officer, who shall be styled the [Commissioner of Excise] and who shall, subject to the general control of the Government, have [Control] of the administration of the Abkari Department and of the collection of the Abkari Revenue or of

both;

(b) appoint any person other than the [Commissioner of Excise] to exercise all or any of the powers and to perform all or any of the duties of the [Commissioner of Excise], subject to the control of the Government;

(c) withdraw from the [Commissioner] or other officer appointed under clause (a) or clause (b) any or all of his powers in respect of the Abkari Revenue;

(d) appoint officers to perform the acts and duties mentioned in Sections 40 to 53 inclusive of this Act;

(e) appoint subordinate officers of such classes and with such designations, powers and duties under this Act as the Government may think fit;

11. Learned Public Prosecutor has drawn my attention to a decision of the Division Bench of this court reported in ***Hassan v. State of Kerala* [1989 (2) KLT 58]**, wherein it is held that the Assistant Sub Inspector has been duly empowered to exercise all powers of Sub Inspectors in G.O.(M.S)217/73 dated 19.12.1973 and in view of Section 13(2) of the Interpretation and General Clauses Act, such authorization is sufficient to confer powers on the Assistant Sub Inspector to exercise the powers of seizure and search in accordance with clause 19 of the Edible oil seeds, Edible oils, Vanaspati and Baby food Dealers Licencing Order, 1975.

12. Nobody has a case that the Assistant Sub Inspector of Police, PW4 was exercising the powers only for the time being as a person in charge of the powers of the office of the Sub Inspector of Police or that he was at any time duly appointed to act on behalf of the Sub Inspector of Police. He was not even in charge of Sub Inspector of Police on that day as revealed from the evidence adduced in this case itself, where the Sub Inspector himself was examined. Therefore, Section 13(2) has no application. The decision cited above has no application to the facts of the case.

13. The search and seizure of article from the possession of the accused comes under Section 34 of the Act. Such a search can be effected only by an Abkari Officer. He alone can arrest without warrant search and seize contraband articles if he is found engaged in commission of offence punishable under the Act. But, PW4 is not an Abkari Officer, as defined under the Act and notified. Therefore, the search and seizure by the Assistant Sub Inspector of Police is illegal and in contravention of Section 34 of the Act. Only an Officer appointed as an Abkari Officer can effect search and seizure and arrest under Section 34 of the Act. Any search in violation of Section 34 is illegal.

14. Now another question arises for consideration. The question is whether the illegal search conducted by an Officer who is not appointed as an Abkari Officer and the evidence collected by him can be used for any purpose or to prove possession of the contraband articles with the accused or not. There are decisions to the effect that, even if the search and seizure are irregular those by themselves will not make the evidence inadmissible. This court was considering the irregularity of search and seizure and non-compliance of Section 31 of the Act, in conducting the search and seizure.

15. In a decision reported in ***Dominic v. State of Kerala [1989 (1) KLT 601]***, this court held that though violation of the provision is indeed a serious matter, and that calls for serious notice, the irregularity in search and seizure, by themselves will not make the evidence inadmissible. In the said case, there was some impropriety in the manner of sending sample for analysis etc. and the court held that the mere non-compliance of Section 31 itself make the evidence collected by such search and seizure inadmissible.

16. In my view, the dictum in the said decision is not applicable to the facts of this case, since total lack of power or authority for PW4, the Assistant Sub Inspector, to conduct search and seizure cuts the

root of search and seizure. This is a case where the search and seizure are made without jurisdiction. The Officer PW4 lacks the power or authority to conduct the search and seizure and therefore any material collected in such illegal search cannot be used for the purpose of proving possession of the contraband article by the accused.

17. A specific official is appointed as an Abkari Officer vesting powers of seizure, search etc. especially in the case of a body search or search of a person and legislature has intended to safeguard personal liberty of a person. No other person can intrude upon and effect illegal search and seizure. Such illegal search cannot be legally recognized and the materials collected in such illegal search cannot be used for any purpose.

18. The Supreme Court in ***State of Punjab vs. Baldev sing (1999(6) SCC 172)*** referring to Section 50 of the Act hold that, "illicit article seized from the person of the accused, during search conducted in violation of the safeguards provided in Section 50 of the Act, cannot by itself be used as admissible evidence of proof of unlawful possession of the contraband on the accused. Any other material or article recovered during that search may, however, be relied upon by

the prosecution in other/ independent proceedings against an accused notwithstanding the recovery of that material during an illegal search and its admissibility would depend upon the relevancy of that material and the fact and circumstances of that case.

19. It was held that even if it be assumed that all the materials seized during an illegal search may be admissible as relevant evidence in other proceedings, the illicit article seized in an illegal search cannot by itself be used as proof of unlawful conscious possession of the contraband by the accused. It was also held that an illegal search cannot also entitle the prosecution to raise a presumption under Section 54 of the NDPS Act, because presumption is an inference of fact drawn from the facts which are known as proved. A presumption can be raised only after the prosecution established that the accused was found in possession of the contraband article in a search conducted in accordance with the provision contained in the Act”.

20. In this case, search, seizure and arrest by an officer who is not an Abkari Officer are illegal and it will not prove the possession of the contraband article with the accused. So, the presumption under Section 64 of the Act also cannot be drawn in this case, because the proof of possession is necessary and inevitable to draw a presumption

under Section 64 of the Act. It is only if possession is proved that accused is bound to explain the possession or account for the possession in which event alone the presumption can be drawn unless the contrary is proved that the accused has committed an offence punishable under Section 55 of the Act. For all these reasons, I find that the prosecution failed to prove that the accused was in possession of the contraband article.

21. There are also various contradictions in the evidence given by both the witnesses, PW3 and PW4 on material particulars. It is also relevant to note that Exhibit P1 is silent about the arrest of the accused from the spot. Though the article seized is said to be arrack, there is nothing in Exhibit P1 to show that the article in the can was tested by atleast taste and smell as arrack. The evidence given by PW3 and PW4 regarding a test by smell and taste is only an improvement in the version given in court. Taking all these facts into consideration, I find that the prosecution fails and the accused deserves an acquittal.

22. In the result, the conviction and sentence passed against the appellant under Section 55(a) of the Abkari Act are set aside. The appellant is found not guilty and he is acquitted of offence under

Section 55(a) of the Abkari Act. He is set at liberty forthwith. If the appellant is still in custody, he shall be released forthwith. The Registry shall issue release memo to the jail authorities concerned immediately.

Appeals are allowed.

K.HEMA, JUDGE

smp & vgs.